No. 87-1464

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SPIRO T. AGNEW and
WILLIAM H. WOOLVERTON, JR.,

Petitioners,

– against –

ALICANTO, S.A. and WILLIAM H. SHAW,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS

PETITIONERS' BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Pursuant to Rule 22.5 of this Court, the plaintiffs petitioners make this reply brief addressed to arguments first raised in the brief in opposition.

I. Contrary to the defendants' contentions, the plaintiffs have had no actual "opportunity" to renew their motion for attachment.

Throughout the defendants-respondents' brief in opposition ("DBr"), the principal ground they repeatedly assert for non-appealability of the district court order is the "opportunity" purportedly given to the plaintiffs to renew their motion for

attachment. This, the defendants contend falsely in various paraphrases, plaintiffs "refused," DBr13, *"objected to"* [defendants' italics] *id.* 15, "rejected," *id.* 19, and "failed to exercise," *id.* 23; elsewhere in their brief the defendants make other statements of the same import.

For two reasons, one, the precise reason given by this Court in *Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A.*, 339 U.S. 684 (1950) no such "opportunity" ever existed. As set forth in the petition ("P") 8, the defendants have forthrightly and unequivocally stated that unless the district court's order was stayed, they would remove their property from New York, and the plaintiffs would not be able to satisfy any judgment they might get.

Any renewed motion by the plaintiffs for attachment and restraint upon the defendants' removal of their property was conditioned by the district court upon the plaintiffs' moving on fifteen days notice with an evidentiary hearing to follow, P21, Appendix ("App.") A-6. Accordingly, as developed in the petition, any "opportunity" the district court may have afforded the plaintiffs to move to attach the defendants' property by renewed motion "upon a showing of further merit" was wholly illusory and chimerical, as aptly characterized by this Court in *Swift & Co., supra*, "an empty rite . . . only theoretically possible." 339 U.S. at 689.

Under those circumstances, the plaintiffs had no reasonable alternative to an appeal and stay of the district court order pending appeal as the only avenues open to them as means of actually securing a possibly collectable judgment. By that appeal and stay, the district court was divested of jurisdiction of the attachment motion as the defendants' attorney was immediately told by that court when he sought a renewed ruling on the attachment motion at the same October 2, 1987 hearing in which summary judgment was denied.

Contrary to the defendants' false assertions, it was never the plaintiffs who "refused," "rejected" or "objected" to a renewal of the attachment motion. It was Chief Judge Weinstein, who

told the defendants' attorney in response to his effort to have the motion reconsidered, "I have no jurisdiction." Transcript of October 2, 1987 hearing on summary judgment ("Transcript, 10/2") 3. When the defendants' attorney attempted nevertheless to pursue the matter, despite Judge Weinstein's statement, the judge told him with finality, "I'll not do a thing as long as its [sic] on appeal. * * * Let them [the court of appeals] decide. I won't do it." *Id.*

II. The defendants' brief in opposition is directed in major part to the merits of the case and of the motion for attachment. Not only are these arguments irrelevant to the court of appeals decision and the petition, but they rest on purported premises lacking foundation in fact.

Although the court of appeals has incisively disclaimed any expression of "opinion on the merits of either the motion for order of attachment or the underlying case," App. A-2, the merits of both are the major subjects argued by the defendants in their brief in opposition to the petition. With no record here, the defendants are asking this Court to accept as true disputed allegations that the district court after study of the defendants' 900-page summary judgment motion uniformly found to be insufficient in the face of the plaintiffs' opposing proofs and law. The defendants used the same arguments in the court of appeals, who explicitly noted that they expressed no opinion on the merits.

To the plaintiffs' ten claims in their complaint, the defendants addressed 900 pages of affidavits, exhibits and memoranda in support of summary judgment, accompanied by a 2800-page document production and 650 pages of deposition transcript, for a grand total of 4300 pages. In their papers they argued in support of summary judgment on all the plaintiffs' claims, urging some seventeen separate and distinct alleged grounds under American federal and New York law in an 81-page memorandum, plus five alleged grounds in a 40-page memorandum of Argentine law (in affidavit form). The district court rejected

them all as insufficient to support summary judgment in the face of the plaintiffs' answering papers.

Accordingly and *a fortiori* the defendants' contentions regarding the relative merits of the plaintiffs' case and their own have no place in an argument to this court with respect to the grant of a writ of certiorari to review a decision that expressly avoided any opinion on the merits.

The issue now before this Court is the appealability of the district court order dissolving the restraint and denying attachment. The defendants at no point challenge the plaintiffs' showing of conflicts on that issue between the court of appeals decision in this case and the contrary decisions of this court and other courts of appeals (including conflicts with decisions of other panels of the Court of Appeals for the Second Circuit). Nor do they even attempt to reconcile the court of appeals decision in this case with its decision, in which two members of the panel on this case participated, in *Dayco Corp v. Foreign Transactions Corp.*, 705 F.2d 38 (2d Cir. 1983) primarily relied upon by the court in its decision in this case.

Less than a month ago, in *Gulfstream Aerospace Corporation v. Mayacamas Corporation*, 56 U.S.L.W. 4243 (U.S. March 22, 1988) this Court, citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) and the three-pronged test of *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) reaffirmed the principles applied in *Swift & Co., supra.* The district court order here appealed from fully meets that test. It "conclusively determine[d] the disputed question" of the plaintiffs' right to an attachment, which "resolve[d] an important issue completely separate from the merits of the action," inasmuch as the district court has held that this action must go to trial, and court of appeals has stated that it expressed no opinion on the merits. Finally, for the reasons set forth above the defendants themselves have made it clear that the order appealed from is "effectively unreviewable on appeal from a final judgment." 56 U.S.L.W. at 4245.

A. The insufficiency of the defendants' summary judgment motion.

While the defendants have quoted the district court's statements in the hearing in which it denied summary judgment "that the plaintiffs' case was 'very thin,' 'highly dubious,' and 'awfully thin,' " they have notably avoided quoting the context in which these remarks were made, Transcript 10/2, 8:

> I'll not grant summary judgment on it because there are all of these issues.

They have also omitted the court's many prior and subsequent rulings at the same hearing regarding the insufficiency of the defendants' grounds for summary judgment on even one of the plaintiffs' ten claims despite their mammoth motion papers and their extensive, multifarious contentions.

Well prior to characterizing the plaintiffs' case as "very thin," the district court at the very threshhold of the defendants' attorney's unsuccessful argument of his motion for summary judgment, had held, Transcript 10/2, 4:

> I read your papers. It's clear there are all kinds of facts here. * * * I will listen to you, but it's clear to me this confused factual tango [sic] requires a trial. * * * How can I grant summary judgment in this kind of a case?

And on the following transcript page, *id.* 5:

> It seems to me there are so many imponderables that I could not grant summary judgment in good faith.

And on the next page after that, *id.* 6, when the defendants' attorney continued to press the court, "I'm not satisfied to grant summary judgment in this case." Finally, after defendants attorney had persisted unavailingly for four more pages of transcript and still strove further to prolong his consistently ineffective arguments, the court courteously but firmly refused to entertain further discussion, *id.* 10:

> I don't really want to extend it. * * * I have read the papers and there is nothing that I can do here just too many factural [sic] questions that I have in my mind.

B. The plaintiff Agnew has never claimed to be the "procuring cause" of the award of the telecommunications contract that led to this lawsuit. The defendants' contentions that he was not are factually superfluous to the merits of both the case and the attachment motion, and therefore, entirely irrevelant to the issues now before this Court.

At no point in the plaintiffs' papers in this case and at no time since its inception have the plaintiffs ever averred or in any way implied that Agnew was the "procuring cause" or the "procuring broker" in the award of the telecommunications contract. Whether Agnew was a "procuring cause" or "procuring broker" is a matter of law, fact or both, and is not and has not been in issue. The defendants made this same contention on the merits of the case to the district court on summary judgment, and it was rejected as insufficient therefor.

Aydin and the defendants set up the October 6, 1980 meeting with Agnew in Washington, where they engaged him to present Aydin to the Junta because they had no entree to the Junta, and he did. Although, the defendants contend at page 6 of their brief that "Agnew had no evidence that any government officials he met in Argentina ever had anything to do with the Air Force contract," this is no more than a cunning, carefully fashioned red herring of the same species as their "procuring cause" argument. Agnew intervened with the Junta on Aydin's and the defendants' behalf because they had expressly requested him to at the October 10, 1980 meeting in Washington, advising him that Aydin's introduction to the Junta, which neither of them had been able to accomplish, was a prerequisite for its qualifying as a bidder on military telecommunications contracts.

C. The defendants' contentions addressed to the merits of the case, asserting that Woolverton's claim is barred are irrelevant to the issues before this Court and devoid of substance.

These contentions also were held by the district court to be insufficient to support summary judgment. The termination agreement provides at its very outset that it applies to the "following pending and future possible projects." It then enumerates and describes four projects, which do not include the Aydin Argentine air force contract, as on the date of the agreement, August 9, 1984, it had been fully completed. After the enumeration and description of the four projects, the agreement says that it "sets forth all projects pending between the parties as of the date of this agreement," but nowhere does it define "projects" or "pending."

As Woolverton points out in his affidavit in opposition to summary judgment, each one of the four "pendng and future possible projects" enumerated in the agreement was either, as those words plainly denote, a project on which his own work was then unfinished (no. 1) or a "possible project" (nos. 2 and 3) or a "future project" (no. 4).

An agreement is to be construed against the party who drew it. This agreement had not been negotiated by Woolverton "with the assistance of counsel," DBr 8, but had been prepared by defendants' attorney, Gass, at the defendant Shaw's direction without consultation with or notice to Woolverton. Shaw had then brought Gass to Woolverton in Alicanto's New York office, without Woolverton's prior knowledge. Before signing, Woolverton was able to get his son, then five years out of law school, to come over and look at it.

By the familiar rule of "*inclusio unius est exclusio alterius*," Shaw's causing Gass to have the agreement drawn with neither mention of the Aydin contract nor broad language extending its ambit beyond the projects expressly named surely demonstrates that it was not intended to apply to the Aydin telecommunications contract, which had been completed and was not then within the ambit of "pending projects," as Woolverton testified on his deposition.

III. The defendants' assertion that the plaintiffs' appeal below was allegedly predicated upon the district court's abuse of discretion in refusing to grant an adjournment is contrary to fact and completely without foundation in the record or the court of appeals decision.

Although the brief in opposition strenuously seeks to make it appear that the four-month extension of the attachment motion and the TRO were somehow the plaintiffs' doing, the latter, like plaintiffs generally, were eager to get on with the case and bring the attachment motion to a head. On March 4, 1987, seven and one-half weeks after the date the court had originally set for plaintiffs' attachment motion, as a result of the successive adjournments requested solely by the defendants, they moved against the plaintiffs' vigorous opposition "To Consolidate Plaintiffs Motion for Order of Attachment with Defendants Motion for Summary Judgment" and for still further delay and extension of the TRO so that they might prepare their motion for summary judgment. Their motion, and the court order they drafted expressly provided for their summary judgment motion to be consolidated and "considered simultaneously" with the plaintiffs' attachment motion.

Ultimately on April 24, 1987, fifteen weeks after the initial return date of the plaintiffs' attachment motion, the defendants served as their answer to the plaintiffs' motion for attachment their 900-page summary judgment motion, together with deposition transcripts and document production for a grand total of 4300-pages, as noted above. In fact Aydin's counsel had previously told the plaintiffs' counsel, "If you bring this suit, you will see nothing but paper."

In accordance with the defendants' scheme, on May 13 they moved on one-day's notice to the plaintiffs to dissolve the restraint before the latter had had anything approaching reasonable time to respond to the 900-page summary judgment motion, which the defendants had taken fifteen weeks to prepare. Although the district court on May 14 agreed readily

and unreservedly with the plaintiffs' attorney that the eighteen-week duration of the TRO until May 14 was entirely the result of the defendants' requests for adjournments, App. A-10, and further agreed that it was a difficult case and the defendants that submitted "a lot of paper," and said that he did not want to pressure the plaintiffs, who could "have all the time" they want, "all the time you need," he nevertheless orally dissolved the temporary restraint and denied the plaintiffs' attachment motion. App. A-9, 10.

Upon rehearing he adhered to his oral May 14 order with his written order of May 27, 1987. From this the appeal was taken, App. A-4, on the ground that it was an abuse of discretion and denial of due process of law for the district court to sever the attachment motion from the summary judgment motion in violation of its prior order of consolidation requiring them to be 'considered simultaneously" and to grant the defendants partial summary judgment, on one day's notice to the plaintiffs, *ex parte* on the basis of only the defendants' papers, but not "with the benefit of a fully developed record," as their March 4 motion had provided.

IV. The defendants' contention that the plaintiffs had no right to reply to the defendants' summary judgment motion submitted in opposition to the motion for attachment is contrary to the applicable law.

The defendants acknowledge that the plaintiffs' were entitled to a reply by a certain date, DBr 4n, but disregard the consolidation order of March 4, 1987, requiring the two motions to be "considered simultaneously."

The power of the district court to grant an order of attachment is provided by F.R.C.P. 64. That rule provides that attachments "are available under the circumstances and in the manner provided by the law of the state."

The defendants agree with the plaintiffs that the *ex parte* restraining order granted the plaintiffs at the commencement of the case is tantamount to a provisional order of attachment. DBr 17. Under New York law, upon a motion to vacate or modify

an order of attachment, "the court may give the plaintiff a reasonable opportunity to correct any defect." N.Y. CPLR § 6223(a). The courts of New York have decided that in order to give any meaning to this provision that

> on a motion to vacate an order of attachment the court is not restricted to the documents submitted in support of such attachment, but shall give the plaintiff a reasonable opportunity to correct any defect.

Worldwide Carriers, Ltd. v. Aris Steamship Co., 301 F. Supp. 64, 66 (S.D.N.Y. 1968). There the district court follows the reasoning advocated in Weinstein-Korn-Miller, *7A New York Civil Practice*, 62-251 ¶ 6223.07:

> "Since most defects on the plaintiff's motion papers or in the attachment order can be corrected easily and since all proceedings under CPLR 6223 are on notice, new proof that would tend to sustain the attachment always should be admitted on a motion under CPLR 6223 unless there is a clear showing of prejudice."

CONCLUSION

For the reasons stated above, the defendants' brief in opposition states no sufficient grounds for the denial of a writ of certiorari, and, therefore, for the reasons set forth in the petition such a writ should issue to the United States Court of Appeals for the Second Circuit to review its order and opinion in this case.

Respectfully submitted,

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